SUPREME COURT, U. S.

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No. 1182

In the Supreme Court of the United States

OCTOBER TERM, 1967

DONALD UELMEN AND PURE MILK PRODUCTS COOPERATIVE, PETITIONERS

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General.

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1. Petitioners brought suit in the district court, seeking to enjoin the Secretary of Agriculture from continuing to effectuate a determination of equivalent prices, issued on April 8, 1966 (31 Fed. Reg. 5685), relating to the pricing of milk under the Milwaukee Milk Marketing Order. 7 C.F.R. 1039. Federal Milk Marketing Orders, including the Milwaukee Order, issued pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601, contain provisions by which the Secretary prescribes uniform minimum prices which handlers (dairies) must pay producers (farmers) for their milk.

295-267—68

Of necessity, the Milwaukee Order, like other federal orders, contains a provision setting forth a method by which Class I (fluid milk) and Class II (manufacturing grade milk) prices are calculated each month. The Class I price, which is the subject of this suit, is set as follows (7 C.F.R. 1039.51(a)):

> (a) *Class I milk price.* The price for Class I milk shall be the basic formula price for the preceding month plus $1.08 August through November; $0.68 March through June and $0.88 in other months: *Provided,* That such Class I price shall be increased or decreased, respectively, 2 cents for each full percent that the adjusted supply-demand ratio computed pursuant to Part 1030 (Chicago) of this chapter is greater or less than 72 percent, but shall not be increased or decreased more than 24 cents because of such adjusted supply-demand ratio * * *.

Thus, one factor used in computing the Class I price in the Milwaukee Order was dependent upon a provision of the Chicago Order. On May 1, 1966, however, the Chicago Order was terminated. This meant that a reference required in the computation of the Milwaukee Class I price was unavailable. The Milwaukee Order expressly provided for such a contingency. 7 C.F.R. 1039.54:

> § *1039.54 Use of equivalent prices.*
>
> If for any reason, a price quotation required by this order for computing class prices or for other purposes is not available in the manner described, the market administrator shall use a price determined by the Secretary to be equivalent to the price which is required.

On April 8, 1966, in anticipation of the termination of the Chicago Order, the Secretary accordingly issued a "Determination of Equivalent Prices for Use in Computing Prices for Class I Milk." 31 Fed. Reg. 5685. In it, he determined that because for each month since September 1960—more than five years—a deduction of 24 cents had been made for the Chicago supply-demand ratio in calculating the Milwaukee Class I price, an equivalent price factor would be "minus 24 cents."

In September 1966, petitioners brought the present suit, seeking (1) a declaration that the determination of equivalent price was invalid because it was issued without notice and hearing and (2) an injunction requiring the Secretary to compute the Milwaukee Class I price without the deduction of 24 cents, and hence to *raise* the price 24 cents—without notice, hearing, or a determination that such a price increase was consistent with the purposes of the Agricultural Marketing Agreement Act (7 U.S.C. 602).

2. Because the petitioners are seeking prospective relief only (App., Pet. Br. in Court of Appeals, pp. 11–12), and because the theory of petitioners' case is that the Secretary had no authority to utilize the supply-demand factor of minus 24 cents without following the statutorily prescribed procedures for amending the milk marketing order, this lawsuit was rendered moot by the subsequent adoption (after notice, hearing, publication, and approval by 75 percent of the producers affected) of amendments to the Class I pricing portion of the Milwaukee Order.

See 31 Fed. Reg. 9206, 14406, 14946, 15061; 32 Fed. Reg. 5695, 6501, 6606. See also App., Pet. Br. in Court of Appeals, pp. 33–37. Any possible doubt that these subsequent amendments embraced approval of the use of the equivalent supply-demand factor of minus 24 cents in the Milwaukee price is eliminated by the specific reference thereto at 31 Fed. Reg. 14948 n. 1. That footnote is appended to a textual statement that the "supply-demand adjustment factors are reaffirmed", and states:

> Including the supply-demand adjustor which is continued as a Class I pricing factor in the following orders and proposed Central Illinois order by means of a determination of an equivalent price: Milwaukee, * * *.

3. Even if it could be argued that the complaint was not confined to prospective relief and that the lawsuit therefore is not moot, the petitioners' claim plainly was without merit. The determination of the equivalent price factor was made in implementation of the specific terms of the existing order, *supra,* and thus did not constitute an "amendment" of the Order as petitioners assert (Pet. 4, 5). Nor did utilization of the equivalent price factor cause any "loss" to farmers who sell milk to handlers regulated under the Milwaukee Order. Rather, the determination resulted in "a continuation of the existing level of the Milwaukee Class I price" (Pet. App. 20), which had been established after notice, hearing, and a favorable

vote of more than 75 percent of the farmers serving the market (Pet. App. 27).[1]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1968.

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[1] Because the lawsuit is now moot and was plainly without merit, this Court need not reach the further holding of the courts below that the petitioners lacked standing to bring the suit.